RECEIVED
NOV 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-498

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

NONNIE MAE NORMAN, ET AL.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents Nonnie Mae Norman, Thomas Norman, Nellie Williams and Jane B. Wilson (by her next friend Marjorie Harvey) ask leave to file their Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in forma pauperis pursuant to Rule 46.

In support of this motion, Respondents are filing their attached affidavits.

Respondents did not seek to proceed in forma pauperis in the courts below for the reason that the only out-of-pocket expenditures were the relatively low docket fees, which Respondents could afford. The considerably higher costs associated with filing in this Court, especially the printing costs, necessitate that Respondents

///

///

///

be permitted to file their Opposition in forma pauperis.

DATED: November 21, 1980.

DENNIS L. HORN
CENTRAL MISSISSIPPI
LEGAL SERVICES
P. O. Drawer 579
Hazlehurst, Mississippi 39083
(601) 894-1302

GILL DEFORD
NEAL S. DUDOVITZ
NATIONAL SENIOR CITIZENS
LAW CENTER
1636 West 8th Street, #201
Los Angeles, California 90017
(213) 388-1381

By Gill Deford
GILL DEFORD

Attorneys for Respondents

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-498

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

VS.

NONNIE MAE NORMAN, ET AL.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, NONNIE MAE NORMAN, being first duly sworn according to law, depose and say that I am a Respondent in the above named cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. I am a citizen of the United States.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe I am entitled to the redress I seek in said cause.

5. I wish to file a Brief in Opposition to the Petition for Writ of Certiorari the Secretary of the United States Department of Health and Human Services filed herein.

Nonnie Mae Norman
NONNIE MAE NORMAN

I declare under penalty of perjury that the above and foregoing is true and correct.

EXECUTED, this the 17th day of November, 1980.

Nonnie Mae Norman
NONNIE MAE NORMAN

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-498

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

VS.

NONNIE MAE NORMAN, ET AL.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, MARJORIE HARVEY, being first duly sworn according to law, depose and say that I am Mrs. Wilson's daughter and her "next friend" in the above named cause, and, in support of her application for leave to proceed without being required to prepay costs or fees, state:

1. She is a citizen of the United States.

2. Because of her poverty, she is unable to pay the costs of said cause.

3. She is unable to give security for the same.

4. I believe she is entitled to the redress she seeks in said cause.

5. On behalf of Jane B. Wilson, I wish to file a Brief in Opposition to the Petition for Writ of Certiorari the Secretary of the United States Department of Health and Human Services filed herein.

Marjorie Harvey
MARJORIE HARVEY, NEXT FRIEND OF JANE B. WILSON

I declare under penalty of perjury that the above and foregoing is true and correct.

EXECUTED, this the 12th day of November, 1980.

Marjorie Harvey
MARJORIE HARVEY, NEXT FRIEND OF JANE B. WILSON

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-498

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

VS.

NONNIE MAE NORMAN, ET AL.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, NELLIE WILLIAMS, being first duly sworn according to law, depose and say that I am a Respondent in the above named cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. I am a citizen of the United States.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe I am entitled to the redress I seek in said cause.

5. I wish to file a Brief of Opposition to the Petition for Writ of Certiorari the Secretary of the United States Department of Health and Human Services filed herein.

Nellie Williams

NELLIE WILLIAMS

I declare under penalty of perjury that the above and foregoing is true and correct.

EXECUTED, this the 18 day of November, 1980.

Nellie Williams

NELLIE WILLIAMS

No. 80-498

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

RECEIVED
NOV 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

NONNIE MAE NORMAN, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GILL DEFORD
NEAL S. DUDOVITZ
NATIONAL SENIOR CITIZENS LAW CENTER
1636 West 8th Street, Suite 201
Los Angeles, California 90017
(213) 388-1381

DENNIS L. HORN
CENTRAL MISSISSIPPI LEGAL SERVICES
P. O. Drawer 579
Hazlehurst, Mississippi 39083
(601) 894-1302

Attorneys for Respondents

No. 80-498

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

NONNIE MAE NORMAN, ET AL.[1/]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether the "reasonability" standard in the Medicaid statute permits participating states to use a fixed, welfare-based formula for determining how much of the income of the spouse of an applicant for Medicaid will be protected or not attributable to the spouse who is applying.

///

///

///

///

///

///

///

1/ In addition to the classes described by the Secretary in her Petition, at 1 n.*, there were six named plaintiffs in the courts below who were class representatives on the claims relevant to the issue of this Petition. Of these, the following are still alive and are opposing this Petition: Nonnie Mae Norman, Thomas Norman, Nellie Williams and Jane B. Wilson (by her next friend Marjorie Harvey).

TABLE OF CONTENTS

	Page
Table of Authorities	iii
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE PETITION	4
1. The 209(b) states are not subject to conflicting orders from the Courts	4
2. A state's use of the 1972 standard necessarily requires that that standard have been legal at that time	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Allen v. Califano, No. C-78-212 (D.Utah, Aug. 23, 1979), appeal pending No. 79-2167 (10th Cir.) 3

Brown v. Stanton, 617 F.2d 1224 (7th Cir.1980), pet. for cert. pending No. 79-1690 . . 5, 6, 7, 8, 9, 10, 11

Caldwell v. Blum, No. 79-CV-569, Slip Op. (N.D.N.Y., Nov. 4, 1980) 12

Foard v. Gibson, CCH Medicare & Medicaid Guide, ¶29,679 (W.D.N.C.1979). 11

Gray Panthers v. Secretary, Dept. of HEW, 461 F Supp. 319 (D.D.C.1978), aff'd sub nom. Gray Panthers v. Administrator, Health Care Financing Administration, No. 79-1334 (D.C.Cir., July 29, 1980), pet. for cert. pending No. 80-756 (filed Nov. 10, 1980) . . . . . passim

Griswold v. Page, CCH Medicare & Medicaid Guide, ¶28,537 (N.D.Fla.1977). 6

Herweg v. Ray, 619 F.2d 1265 (8th Cir. 1980) (en banc), pet. for cert. pending No. 80-60 (filed July 14, 1980) 1, 5, 6

Houston W.R.O. v. Chapman, 555 F.2d 1219 (5th Cir. 1977), rev'd on jur. grounds 99 S.Ct. 1905 (1979) . . 13

Johnson v. White, 528 F.2d 1228 (2d Cir. 1975). 13

Krygier v. Buscaglia, CCH Medicare & Medicaid Guide, ¶29,761 (W.D.N.Y.1979). 11

Metcalf v. Trainor, 472 F.Supp. 576 (N.D.Ill.1979). . . 13

Norman v. St. Clair, CCH Medicare & Medicaid Guide, ¶29,677 (S.D.Miss.1979), aff'd in part, rev'd in part, 610 F.2d 1228 (5th Cir. 1980) 6, 7, 8, 9, 11, 12, 13

Roselli v. Affleck, 508 F.2d 1277 (1st Cir. 1974) . . . 13

Rubin v. Creasy, CCH Medicare & Medicaid Guide, ¶29,678 (S.D.Ohio 1979) 11

Winter v. Trainor, CCH Medicare & Medicaid Guide, ¶28,151 (N.D.Ill.1977) 12

TABLE OF CONTENTS

Page

STATUTES

24 U.S.C. §1396a(a)(10) 5, 6
§1396a(a)(17) 1, 7, 11, 12
§1396a(f) 4, 5, 7, 12

REGULATIONS

42 C.F.R. §435.723(c), (d) 6
§435.822(b) 6
§448.3(b)(4) 2

45 C.F.R. §248.3(b) 1
§248.3(b)(1) 1, 2
§248.3(b)(4) 2

MISCELLANEOUS

42 Fed. Reg. 2684, et seq. 1, 2, 6
42 Fed. Reg. 53827 2

43 Fed. Reg. 45176, et seq. 2

44 Fed. Reg. 66855 3

45 Fed. Reg. 71821 4

STATEMENT OF THE CASE

Although the Secretary's Statement (Pet., at 3-7) is essentially accurate, it neglects points relevant to the consideration of this petition.

Most important is the Secretary's failure to describe the background of the regulations which are the subject of this case. Until April 13, 1977, which was about a month after the complaint in this case was filed, the regulations applicable to the 209(b) and SSI states were exactly the same. 45 C.F.R. §248.3(b) (Oct. 1, 1976). This was so despite the fact that the SSI program came into operation on January 1, 1974. These regulations tracked the Medicaid statute, 42 U.S.C. §1396a(a)(17), by providing that "only such income and resources as are actually available will be considered and that income and resources will be reasonably evaluated." 45 C.F.R. §248.3(b)(1) (emphasis supplied). Thus, at the time that this case was filed, the applicable regulations required that all states make reasonable evaluations of income and resources, and that they not presume any income or resources available to the applicant unless they were in fact available. In practice, however, states did not follow either of these dictates, and HHS' predecessor, the Department of Health, Education and Welfare, did not require that they do so.

The revised regulations [2/] undertook for the first time to distinguish between the SSI and 209(b) states. Thus, the SSI states had their deeming policies limited by the relevant SSI provisions,[3/] while the 209(b) states were allowed to use criteria no more restrictive "than that included in the

---

2/ See 42 Fed.Reg. 2684, et seq. (Jan. 13, 1977).

3/ See, generally, Herweg v. Ray, 619 F.2d 1265 (8th Cir. 1980) (en banc), pet. for cert. pending No. 80-60 (filed July 14, 1980).

State's January 1972 title XIX [Medicaid] plan." 45 C.F.R. §248.3(b)(4). Presumably, what was in a state plan on January, 1972 reflected the federal regulations then in effect, that is, those described above which required the states to make reasonable evaluations and to consider only "actually available" income and resources.[4/]

The next wording change in the regulations[5/] occurred with the rewriting and renumbering of many Medicaid regulations, effective October 1, 1978. This change resulted in the present wording of the regulation applicable to the 209(b) states, but the prologue to the "new" rules specifically stated that it created no substantive or policy changes. 43 Fed.Reg. 45176, et seq. (Sept. 29, 1979). As a result, the present regulatory citation, 42 C.F.R. §435.734, which merely restates the previous requirement that states cannot use more extensive rules than those in effect in January, 1972, represents the direct descendant of the old 45 C.F.R. §248.3(b)(1), which, under any rational interpretation, appeared to prohibit deeming altogether.

Furthermore, and perhaps most importantly, the Secretary has neglected to note that, in fact, there are no existing Medicaid deeming regulations regarding income. The regulations were invalidated over two years ago by the decision in Gray Panthers v. Secretary, Department of Health, Education

///

///

///

4/ Comments to the "new" regulations primarily discuss their effect in the SSI states, corroborating the conclusion that in the 209(b) states, where only the Medicaid statute was at issue, there was no change in policy. See 42 Fed.Reg. 2684-2686.

5/ In the interim, a redesignation took place which changed the relevant regulation from 45 C.F.R. §248.3(b)(4) to 42 C.F.R. §448.3(b)(4). See 42 Fed.Reg. 52827 (Sept. 30, 1977). The wording was not altered.

& Welfare, 461 F.Supp. 319 (D.D.C.1978). Another court, in an unpublished order, also invalidated these regulations. Allen v. Califano, No. C-78-212 (D.Utah., Aug. 23, 1979), appeal pending No. 79-2167 (10th Cir.). And the District of Columbia Court of Appeals recently affirmed the invalidation of the regulations by its lower court. Gray Panthers v. Administrator, Health Care Financing Administration, No. 79-1334 (D.C.Cir., July 29, 1980), pet. for cert. pending No. 80-756 (filed Nov. 10, 1980). As a result of these decisions, and of the Secretary's inability to obtain stays from any of these courts, there have been no Medicaid regulations applicable to the deeming of income since December 8, 1978.

The Secretary's response to these decisions has been threefold. On May 18, 1979, the Department issued an "HCFA [Health Care Financing Administration] Regional Letter" to its regional offices instructing them to direct the affected jurisdictions "to cease deeming income for any length of time between aged, blind, or disabled Medicaid applicants, residing in institutions, and their spouses." It further stated that an "Action Transmittal" would follow immediately, as that "is the most expeditious way to inform States of the necessary action. The Action Transmittal will be policy, effective until revised regulations are published." Three days later the Action Transmittal was sent to the states, and it restated the order of the Regional Letter. "This Action Transmittal is therefore being issued as an interim measure to assure implementation of the[District] Court's Order in a timely manner."

Secondly, proposed regulations to implement the Gray Panthers and Allen decisions were published on November 21, 1979. 44 Fed.Reg. 66855. They were never issued in final form.

Finally, under a District Court order setting a schedule for the publication of regulations comporting with the dictates of the Court of Appeals in Gray Panthers, the Secretary published another set of proposed regulations on October 30, 1980. 45 Fed.Reg. 71821. Both of these two sets of proposed regulations, if issued finally in substantially the same form, would severely restrict state income deeming policies. The first set would have ended income deeming altogether; the second would impose time period limitations on deeming. It should be restated, however, that under the Action Transmittal of May, 1979, income deeming has been explicitly forbidden altogether. That transmittal is "policy", and is still in effect.

REASONS FOR NOT GRANTING THE PETITION

The Secretary has offered essentially two arguments to support her petition. First, and primarily, she contends that the Court of Appeals misinterpreted the statute and that the decision below is "irreconcilable" with that of other appellate court decisions on this issue. Pet., at 7-14. Secondly, she contends that the decision below "would result in requiring the states to cover many aged, blind, or disabled individuals whom they would not have been required to cover on January 1, 1972 [a result which] conflicts with the language of 42 U.S.C. §1396a(f)." Pet., at 15. Respondents will consider each of these arguments in turn.

1. The 209(b) states are not subject to conflicting orders from the Courts.

As the Secretary notes, there are three other recent federal appellate decisions on the issue of deeming, all now

pending before this Court.[6/] The Secretary is a defendant in Gray Panthers, and has either filed, or intends to file, in response to invitations from this Court, an amicus brief in the other two.[7/] There is no doubt that, regardless of whether the Secretary is formally involved in a given case, HHS policies are at least somewhat at issue in all three. Not surprisingly, then, the Secretary contends that "[e]ach of these decisions is in some manner irreconcilable with the others." Pet., at 8. This analysis, however, is misleading, and does not support the granting of the petition.

First, the Herweg case has little, or nothing, in common with the other three. Iowa, the state whose policies are challenged in Herweg, is not a 209(b) state. The key to the solution of Herweg is thus not 42 U.S.C. §1396a(f), but 42 U.S.C. §1396a(a)(10). The former section permits states to use more restrictive eligibility conditions, and it is on the basis of that section that HEW and now HHS have promulgated regulations which, except for court orders and the Action Transmittal, would permit unlimited deeming in the 209(b) states. The 209(b) option, though, is the exception to the rule, which is set out in 42 U.S.C. §1396a(a)(10); in brief, it requires states to provide Medicaid coverage automatically to all the aged, blind, and disabled who are eligible for Supplemental Security Income (SSI) benefits. On the basis of this "SSI-Medicaid link", HEW promulgated the regulations which divided the SSI and 209(b) states, and required the

---

6/ Gray Panthers v. Administrator, supra; Herweg v. Ray, supra; Brown v. Stanton, 617 F.2d 1224 (7th Cir. 1980), pet. for cert. pending No. 79-1690.

7/ In Brown, the government urges this Court to grant the petition. Given HHS' position before the Eighth Circuit, respondents assume that the same request will be made in Herweg.

former to limit deeming to one or six months, depending on the eligibility status of the two spouses. The comments to those regulations describe their legal basis: "The new regulations require States to use title XVI availability criteria where Medicaid is provided to all [SSI] recipients, as is already called for in section 1902(a)(10) of the [Social Security] Act [42 U.S.C. §1396a(a)(10)]." 42 Fed.Reg. 2684. The successors to those regulations, now codified at 42 C.F.R. §§435.723(c), (d) and 435.822(b), are not at issue in any of the three other cases, nor in any other pending cases.8/

Indeed, although deeming is the source of the dispute in Herweg, the real issue in that case is a larger one: whether 42 U.S.C. §1396a(a)(10) does require that the SSI states use all of the SSI criteria in their Medicaid determinations. In its regulations, and in the amicus brief filed before the Eighth Circuit, HEW, and now HHS, answer that question affirmatively. HHS supported the plaintiffs' position in Herweg, and, presumably, will do so in the amicus brief filed before this Court. The resolution of Herweg, thus, will not affect the result in this or any other pending case, or, indeed, in any conceivable case involving the criteria relevant to 209(b) states. The issue in Herweg is the relationship between the SSI program and Medicaid; that is not the issue in the case below, or in Brown or Gray Panthers. In short, it is inaccurate to characterize Herweg as irreconcilable with these other decisions. Although deeming is nominally the issue of that case as well, it bears no relationship to the other cases.

Norman, Brown, and Gray Panthers all involve the

8/ Those regulations were implicitly upheld in the only other case challenging the deeming practices of an SSI state after those regulations became applicable. Griswold v. Page, CCH Medicare & Medicaid Guide, ¶28,537 (N.D.Fla.1977).

proper interpretation of 42 U.S.C. §§1396a(a)(17) and 1396a(f). They all are concerned with the propriety of deeming in the 209(b) states. Brown and the instant case are challenges to state practices which HHS claims are permitted under the statute. Gray Panthers is a direct challenge to the federal regulations themselves. Although there are some inconsistencies amongst the three cases, the effect of the decision in Gray Panthers is of a substantially different character than that in Brown and Norman.

If in fact the circuits have split in their analysis, it is only a philosophical, not a practical, split. The decision in Gray Panthers, since it is directed at the Secretary and requires certain policies to be implemented in all the relevant jurisdictions, automatically resolves any inconsistent decisions emanating from other circuits. At present, as has been noted, all of the affected jurisdictions are under an explicit and definitive order from HHS which forbids them from deeming. The federal regulations which are indirectly at issue in Brown and Norman are invalid, and have legally not existed for nearly two years. HHS is under orders to promulgate replacement regulations, with December 11, 1980 as the date by which those final regulations must be published. There is thus no need for this Court to intervene in the dispute because consistency among the states is guaranteed by the decision of the District of Columbia Court of Appeals.

That Gray Panthers does control the outcome, regardless of the decisions of the Fifth and Seventh Circuits, is evident from the present disposition of the cases. The Brown decision discusses the two levels of inquiry which are at issue in this kind of case. The first is the determination of the amount of income which a spouse should contribute; many states, like

Indiana and Mississippi, used to apply an arbitrary formula, such as the welfare level for that category of individual, and then deem the remaining income available. The second level of inquiry is more properly associated with the word deeming, for it is the issue of whether, regardless of how a proper amount is arrived at, a state may merely assume, or deem, that that amount is available without, in fact, the existence of an actual contribution. A necessary by-product to that question is how to treat the spouses when the "contributing" spouse fails to contribute. See 617 F.2d, at 1227-1228.

The Seventh Circuit resolved the first question in plaintiff's favor, by affirming the district court's determination that a flexible mechanism was necessary in order to ensure that the needs of the spouse and family remaining at home were met. Id., at 1228. The Fifth Circuit reached a virtually identical conclusion on this point:

> "The bottom line is that in the formulation of its applicable standards the state is not free to act arbitrarily or inflexibly but must stay within the reality of basic, fundamental facts as they apply to the status of the parties under consideration. The state may outline general guidelines for the use of local caseworkers. It must steer clear of rigid, blanket deductions to the exclusion of other factors." 610 F.2d, at 1242.

Thus, on this first level of inquiry, there is no conflict between the Fifth and Seventh Circuits. Indeed, no court which has considered the deeming issue has reached a different conclusion on this point. They agree that the statute requires, at a minimum, that a flexible system be employed to calculate the proper amount that one spouse must be permitted to keep in order to maintain the living situation. They

recognize that the use of an arbitrary and inflexible formula violates the reasonability provision of the statute. Consequently, on the issue which the Secretary asks this Court to consider, there is no conflict in the circuits.

At the second level of inquiry, the Seventh Circuit has determined that a state cannot impute a given amount available, 617 F.2d, at 1230-1231, while the Fifth Circuit allowed Mississippi to do so. 610 F.2d, at 1237. This issue, however, is not raised in the Secretary's petition. And, for all practical purposes, it has become irrelevant. First, despite the Court of Appeals' decision in Norman, Mississippi has not begun to deem again. Apparently operating according to the decision of the lower court, which precludes the consideration of income and resources which are not in fact available, CCH Medicare & Medicaid Guide, ¶29,677, at p. 10,138 (S.D.Miss.1979), and according to the HHS directives issued pursuant to Gray Panthers, Mississippi has not reverted to the other system. Furthermore, the issue will soon be moot in Mississippi, as it has decided to become an SSI state effective July, 1981, see Petition, at 14, which will require it to use the SSI-type deeming regulations.

Secondly, the precedent set in Norman cannot affect other states in the Fifth Circuit for the simple reason that Mississippi is the only 209(b) state in that Circuit. The Fifth Circuit's decision, thus, can have no direct effect outside of Mississippi.

The only difference, therefore, between the decisions in this case and in Brown is thus of no practical significance. Mississippi has not reverted to deeming, and, of course, because of the invalidation of the deeming regulations by the decisions

///

in Gray Panthers, it could not.[9/] The various problems created by different circumstances have been fully considered in Gray Panthers. With those factors in mind, and with the guidance of the Court of Appeals' decision in that case, the Secretary will have to devise a flexible and rational system applicable to all deeming situations and to all affected jurisdictions. Thus, while the decisions of the Fifth and Seventh Circuits, and other courts considering the issue, provide insight and analysis, those decisions, even to the limited extent they might conflict, do not require the attention of this Court. The Norman decision will not determine how Mississippi treats the deeming issue in the future; the Gray Panthers decision will. A uniform policy has already been applied to the states via the Action Transmittal; that policy will be reinforced by new regulations issued pursuant to the Court of Appeals' decision in Gray Panthers.[10/]

The Secretary's petition is concerned with the propriety of the Fifth Circuit's requirement of flexibility, an issue on which there is no disagreement between the circuits.

9/ Furthermore, there is no conflict between Brown and Gray Panthers. The former is focused solely on deeming between spouses separated by institutionalization. 617 F.2d, at 1226. The latter, which covers the entire range of scenarios in which deeming might arise, directs special attention at this most important area of deeming, that between spouses separated by the institutionalization of one.

10/ By contrast, if, several years from now, states apply the new regulations differently, resulting in conflicting decisions from the appellate courts, there would be a need for this Court's participation. But, at present, the issue raised by these various cases has been resolved by the invalidation of the prior regulations and the guidelines provided in the Gray Panthers appellate decision.

///

///

///

Moreover, what conflict does exist between Norman, and Brown and Gray Panthers, is resolved by the far-reaching nature of the latter decision.[11/] The issue of Medicaid deeming has thus been resolved in a manner which requires a consistent policy in all the affected jurisdictions. In practical terms, there is no split in the circuits.

2. A state's use of the 1972 standard necessarily requires that that standard have been legal at that time.

The Secretary has also suggested, almost as an afterthought, that this Court should review the Fifth Circuit's determination because it will require Mississippi to employ eligibility conditions less restrictive than those in effect in January, 1972, thereby violating section 1902(f) of the Act, 42 U.S.C. §1396a(a)(17). On both legal and common sense grounds, however, the Secretary is incorrect on this point.

In both courts below, and now to this Court, the Secretary has argued that the language of the 209(b) option must be literally read to mean that whatever standards a state had in effect in January, 1972, it is permitted to employ them now. In effect, the Secretary contends that the mere failure of recipients to challenge illegal eligibility conditions in 1972 or before operates to retroactively establish their legitimacy. Thus, a state rule which was impermissible in 1972 is now permissible because it existed in 1972 and was never

---

11/ Furthermore, the Norman decision stands virtually alone in its analysis on that point. As both the Norman and Brown courts noted, the district courts have uniformly concluded that deeming of any kind was not permitted under 42 U.S.C. §1396a(a)(17). See 610 F.2d, at 1240 n.16; 617 F.2d, at 1228-1230. In addition to the cases cited there, others have come to the same conclusion. Rubin v. Creasy, CCH Medicare & Medicaid Guide, ¶29,678 (S.D.Ohio 1979); Foard v. Gibson, CCH Medicare & Medicaid Guide, ¶29,679 (W.D.N.C.1979); Krygier v. Buscaglia, CCH Medicare & Medicaid Guide, ¶29,761 (W.D.N.Y.1979); Norman v. St. Clair, CCH Medicare & Medicaid Guide, ¶29,677 (S.D.Miss.1979).

invalidated. This literal reading of the provision, however, does not comport with Congress' intent, and the Fifth Circuit so recognized it:

> "[209(b)] can not be viewed as an all-purpose 'grandfathering' clause which effectively legitimizes any and every provision appearing in a state plan in 1972. We find no indication that in passing 209(b) Congress intended to authorize otherwise improper procedures. In other words, if, in January, 1972, the state's deeming procedure was impermissible under 42 U.S.C. §1396a(a)(17), it cannot now be made acceptable simply because of §209(b)." Norman v. St. Clair, supra, 610 F.2d, at 1235.

Were it otherwise, all present provisions which were in use in 1972 would be immune from challenge, regardless of the other requirements of the Medicaid statute.

This argument was also raised by the State of Illinois. The court there reached the same conclusion as did the Fifth Circuit:

> "Implicit in 42 U.S.C. §1396a(f) is the concept that any January, 1972 standard which the state might elect to return to in January, 1974, was a valid standard .... [U]pon exercising its option under 42 U.S.C. §1396a(f), [Illinois] could only elect to return to a standard which was in compliance with statutory and regulatory requirements." Winter v. Trainor, CCH Medicare & Medicaid Guide, ¶28,151 at p. 10,599 (N.D.Ill.1977); see also Caldwell v. Blum, No. 78-CV-569, Slip Op., at 21 (N.D.N.Y., Nov. 4, 1980) (re-issuance of preliminary injunction after New York took 209(b) status in response to original Caldwell decisions, 621 F.2d 491 (2d Cir. 1980)).

Courts in similar situations have reached the same conclusion: that a state cannot obtain prospective validation of illegal provisions merely because they were not invalidated in the past. See, e.g., Roselli v. Affleck, 508 F.2d 1277, 1280 (1st Cir. 1974); Johnson v. White, 528 F.2d 1228, 1236-1237 (2d Cir. 1975); Houston W.R.O. v. Chapman, 555 F.2d 1219, 1225 (5th Cir. 1977), rev'd on jur. grounds 99 S.Ct. 1905 (1979); Illinois W.R.O. v. Trainor, 438 F.Supp. 269, 279 (N.D.Ill.1977); Metcalf v. Trainor, 472 F.Supp. 576, 587 (N.D.Ill.1979). A past failure to challenge a provision cannot operate to insulate it forever from attack.[12/]

This contention is therefore without merit. No court has embraced it; every court which has been expressly faced with it has rejected it. The 209(b) option was no more than an effort to protect states from the potentially expensive costs associated with eligibility conditions based on the SSI program. See Petition, at 5. It was never intended, as the court below noted, as an "all-purpose 'grandfathering' clause." 610 F.2d, at 1235.

CONCLUSION

There is no split in the circuits on the arguments raised by the Secretary. Even if there were, all aspects of this issue have been resolved by the decision in Gray Panthers. Whatever differences may exist in the various cases, the decision of the Court of Appeals for the District of Columbia Circuit provides consistent direction for the Secretary

---

12/ Indeed, necessarily implicit in all decisions upholding challenges to eligibility conditions in 209(b) states is that the Secretary's interpretation of §209(b) is wrong. Were it otherwise, these decisions would have had to have gone the other way, for they were brought on the same basis as was this case, i.e., that a provision now in effect was invalid in both 1972 and the present.

and the states.

The petition for certiorari should therefore be denied.

DATED: November 21, 1980.

Respectfully submitted,

DENNIS L. HORN
Central Mississippi Legal Services
P. O. Drawer 579
Hazlehurst, Mississippi 39083
(601) 894-1302

GILL DEFORD
NEAL S. DUDOVITZ
National Senior Citizens Law Center
1636 West 8th Street, Suite 201
Los Angeles, California 90017
(213) 388-1381

By _____
GILL DEFORD

Attorneys for Respondents

RECEIVED
NOV 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-498

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

NONNIE MAE NORMAN, ET AL., RESPONDENTS

CERTIFICATE OF SERVICE

I, Gill Deford, a member of the Bar of the Supreme Court, do hereby certify that, pursuant to Rule 28.5 of the Rules of this Court, I have served on this 21st day of November, 1980, three copies of the MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS by depositing them, enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed to WADE H. McCREE, JR., Solicitor General, ALICE DANIEL, Assistant Attorney General, GEORGE W. JONES, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; and to JOAN Z. BERNSTEIN, General Counsel, ROBERT P. JAYE, EDITH S. MARSHALL, DAVID SMITH, Attorneys, Department of Health and Human Services, Washington, D.C. 20202.

I further certify that all parties required to be served have been served.

GILL DEFORD
National Senior Citizens Law Center
1636 W. 8th St., Ste. 201
Los Angeles, California 90017

Counsel for Respondents